

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION**

SAMUEL GAINES, JR.,)
)
Petitioner,)
)
v.) CIVIL ACTION NO. 5:19-CV-76 (MTT)
)
JOSE MORALES, Warden,) Habeas Corpus
) 28 U.S.C. § 2254
)
Respondent.)
)

ORDER

Magistrate Judge Charles H. Weigle recommends dismissing the Petitioner's second Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 that he has filed with this Court (Doc. 1) and motion to dismiss judgment (Doc. 8). Doc. 10. The Petitioner objected to the Recommendation. Doc. 11. Pursuant to 28 U.S.C. § 636(b)(1), the Court has reviewed the Recommendation, considered the Petitioner's objection, and has made a de novo determination of the portions of the Recommendation to which the Petitioner objects.

The Petitioner's objection is largely citations of inapplicable case law. See generally Doc. 11. As stated by the Magistrate Judge, the "Petitioner has not been granted permission to file a second or successive habeas petition by the Eleventh Circuit," and this Court thus "lacks jurisdiction to consider these claims."¹ *Id.* at 12. To

¹ The Petitioner's motion to dismiss judgment is largely the same as his petition. *Compare* Doc. 8 with Doc. 1. Accordingly, the motion and petition will be considered together as his petition for habeas corpus.

the extent that the Petitioner wishes to make a Rule 60(b) motion, he has not “shown that he is entitled to relief.” *Id.*

The Court has reviewed the Recommendation, and the Court accepts the findings, conclusions, and recommendations of the Magistrate Judge. The Recommendation (Doc. 11) is **ADOPTED** and made the order of this Court. Accordingly, the Petitioner’s habeas petition (Doc. 1) is **DISMISSED without prejudice**, and his motion to dismiss judgment (Doc. 8) is **DENIED**.

CERTIFICATE OF APPEALABILITY

The Magistrate Judge also recommends that the Court deny a certificate of appealability. *Id.* at 12. A petitioner seeking to appeal a district court’s final order denying his 28 U.S.C. § 2254 petition has no absolute entitlement to appeal and must obtain a certificate of appealability (“COA”). 28 U.S.C. § 2253(c)(2); see also *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides that “[t]he district court must issue or deny a [COA] when it enters a final order adverse to the applicant,” and if a COA is issued, then “the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).”

Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” This requires a demonstration that “jurists of reason could disagree with the district court’s resolution of [a petitioner’s] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citation omitted). The “petitioner must demonstrate that

reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.* at 338 (citation omitted). When the Court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, as in this case, the Petitioner must show that “jurists of reason would find it debatable whether the district court was correct in its procedural ruling,” and (2) “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.” *Slack*, 529 U.S. at 484. The Petitioner has not made these showings and has not objected to this part of the Recommendation. See generally Doc. 11.

Therefore, the Petitioner is **DENIED a COA**.

Additionally, because there are no non-frivolous issues to raise on appeal, an appeal would not be taken in good faith. See 28 U.S.C. § 1915(a)(3) (“An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.”) Accordingly, any motion to proceed in forma pauperis on appeal is **DENIED**.

CONCLUSION

The Recommendation (Doc. 10) is **ADOPTED** and made the order of this Court. Accordingly, the Petitioner’s habeas petition (Doc. 1) is **DISMISSED without prejudice**, and his motion to dismiss judgment (Doc. 8) is **DENIED**. Any certificate of appealability is **DENIED**, and any motion to proceed in forma pauperis on appeal is **DENIED**.

SO ORDERED, this 16th day of July, 2019.

S/ Marc T. Treadwell
MARC T. TREADWELL, JUDGE
UNITED STATES DISTRICT COURT